



The Voice of Rural Telecommunications

EX PARTE OR LATE FILED

April 20, 1998

Ms. Magalie R. Salas, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte Communications
CC Docket No. 96-45
AAD/USB File No. 98-37

DOCKET FILE COPY ORIGINAL

Dear Ms. Salas:

NTCA has reviewed the cases cited in the April 9, 1998 *ex parte* of Iowa Communications Network (ICN) in support of its claim that it is a telecommunications carrier within the meaning of the Communications Act.

The cases are cited for the proposition that an entity becomes a common carrier by holding out its services indifferently to all potential customers. ICN claims that it meets this test because "it makes services, including distance learning and telemedicine, available to all potential users of those services." This claim is inconsistent with the facts that: (1) the ordinary voice and data services are obviously suitable for a wide variety of users; (2) "distance learning" is essentially two-way video transmission, for which there are many other potential, but not authorized, users; and (3) telemedicine is also not a communications service, but a series of options for utilizing ordinary communications services for medical purposes. See, 47 C.F.R. 54.601(c). In any event, ICN has not claimed to be an "eligible" carrier which is required to receive support for service to rural health care providers.

The real issue raised by the ICN is whether a common carrier can restrict its services to a list of "authorized" users, and refuse service to others for whom the service is suitable. As discussed in the attached summary, the cases cited do not lead to such a conclusion. To the contrary, they provide broad support for the position that a common carrier must serve all users for whom its services are suitable. It necessarily follows that an entity cannot avoid this requirement by declaring otherwise potential customers not potential customers because they are not "authorized."

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In accordance with the ex parte rules, two copies have been submitted to the Secretary. If there are any questions in this matter, please contact me at NTCA.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Scott Reiter". The signature is fluid and cursive, with the first name "R." and last name "Reiter" clearly distinguishable.

R. Scott Reiter
Senior Industry Specialist
Legal and Industry Division

Attachment

cc: Irene Flannery
Jane Whang

NTCA RESPONSE TO ICN APRIL 9 EX PARTE

1. General Principles

- 13 Am. Jur. 2d Carriers

The reference illustrates only the point that carriers do not have to carry what they do not hold out to carry; but they do have to carry *for* any anybody who tenders what they hold out to carry. The reference offers no support for the proposition that common carriers may pick and choose customers.

- NARUC I

The case states that a common carrier service may be specialized so that it is of possible use only to a fraction of the population; but the carrier cannot discriminate among that fraction. E.g., two-way video transmission service provided to schools can't be refused to a business which wants a service with the same characteristics. Business may be turned away because it is not of the type normally accepted, or because the carrier has no more capacity. E.g., a carrier offering voice grade POTS only can turn away a request for frame relay. A satellite carrier with only three transponders and three users each using a transponder can refuse the order for a fourth transponder.

II Carriers and Services Limited by Statute and Regulation

- Comsat Act

Comsat, was incorporated with the express intent of Congress to further US foreign policy goals, was declared to be a common carrier and made explicitly subject to Titles II and III of the 1934 Act. An entity can be a carrier because of its holding out, or because public policy requires it to so hold out. Congress is free to designate any entity it wishes as a common carrier, but in the 1996 Act it did not extend common carrier status to ICN or any other with organic restrictions such as Comsat. Nor has the Iowa legislature restructured ICN as a common carrier, although it has had more than two years since the 1996 Act was passed expressly limiting direct support to telecommunications carriers .

- Graphnet

The ECOM service at issue was offered to the public, not to specifically limited classes of users.

- Amtrak

Amtrak's authority may be limited as to the services it can provide, but there is no limitation on who it can carry.

- Channel Facilities

The Commission required telephone companies to obtain Section 214 authorization and file tariffs for a service which delivered broadcast signals from a headend to subscribers. Channel service offerings were designed ("suitable") for cable tv companies, but there was no prohibition on providing the service to anyone else.

III Common Carriers Choosing to Limit Their Services

- Tower Communications

Tower was given authority to operate on a common carrier basis, even though initially its only customer would be its affiliate. Tower anticipated that it would provide services to non-affiliated systems shortly after becoming operational, and was required to file a tariff for its services. The Common Carrier Bureau noted that Section 21.700 of the Rules was intended to deal with the concern that entities were claiming to be common carriers even though serving only affiliates, in order to obtain spectrum available only to common carriers, but that concern was not applicable to a receive only station. This case parallels the concern underlying Section 21.700 in that the state networks, such as ICN, want to be classified as common carriers in order to obtain a benefit, even though they do not provide service to the public.

- Telestra

A Section 214 Certificate with no discussion or indication that service was restricted to any class of users. To the contrary, it was authorized to resell services to various international points, excluding Australia, and to provide switched services and international private lines between the United States and Australia. It is not the geographical limitation to the state of Iowa which prevents ICN from acting as a common carrier, the disqualification arises from the restriction that it may not provide services to otherwise potential users for whom those services would be suitable.

- ITT

A licensing decision allowing the use of earth stations to provide broadcasters with the capability of covering the recovery of the Gemini-9 spacecraft. Nothing in this order suggests that the carrier could pick and choose customers, e.g., that it could have chosen to serve NBC, but refused CBS if it had capacity to carry both.

- Consortium Communications

Section 214 Authority was granted to provide direct Telex service between the U.S. and India (not Japan). Telex was a public record service, for which the carrier was ordered (para. 4) to file a tariff. There is no indication that any member of the public who

tendered a message for transmission to India would, or lawfully could, be refused service
There is no relevance to ICN's request whatsoever except to repeat once again that
common carriers must serve the public.

- Mobilefone of Northeast Pennsylvania

To the extent the Pennsylvania PUC in 1980 allowed a carrier to limit its service to a
class of customers (physicians), the decision stands alone and does not represent federal
precedent.

- R.R. Comm'rs v. Rosenstein

Another old state case, but one that cuts against ICN's position. A trucker was determined
to be attempting to avoid being classified as a common carrier because common carrier
certification was unlikely to be obtained. After a hornbook recitation of the common law
rules of common carriage the court concluded that the defendant's claims of private
carriage were inconsistent with his behavior, that he carried films to theaters not in his
purported "association", that it was his purpose to carry films to all theaters in the area,
and that the association was not real, but merely a subterfuge to avoid the requirement for
obtaining a certificate before providing service.

ICN does not claim that it serves any users not authorized, nor is there any suggestion
that the group of authorized users is a sham. The court had no concern with limitation of
the service to transporting films because that limitation goes to the issue of suitability of
the service, it says nothing about whether a common carrier may refuse to serve any or a
class of customers: "It is not necessary ...that he be required to carry goods of any
descriptionA common carrier may hold itself out to the public as being a carrier of
specified articles only...it is under no obligation to carry other things." 252 North
Western Reporter at 254. Just as a trucker can be a common carrier of movie films, ICN
could, if authorized by the state, become a common carrier which offered only two-way
video connections. ICN cannot, however, be a common carrier and impose the
telecommunications equivalent of transporting movie films only to "authorized" theaters.

- United Parcel Service

This case makes the same point, holding that UPS doesn't have to carry petroleum
products. The case gives no support or even mention of ICN's claim that a common
carrier can choose its customers.

- Neubauer v. Disneyland

Same again, Disney doesn't limit its customers to authorized users.